

The Strengthening of Hindu Law Reflection in Globalization Era

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Abstract

Globalization is a necessity. This concept is realized throughout the world in the world, including Indonesia. In addition, globalization has come into existence and affects almost all of the human life in a State, not only affecting the economic, political, socio-cultural, as well as the legal field. For Indonesia, in particular how to use the law in Hindu society in Indonesia, globalization that brings its individuality becomes a challenge for Hindu law with socio-religious style can still be maintained and empowered in arranging people's life especially Hindu community in Indonesia. In order for a nation to adapt to the effects of globalization, even exist in the midst of the enormity of globalization, then the steps that should be done is to revitalize the values of Pancasila as the State Ideology in all aspects of everyday life. Hindu laws that live and thrive in Bali, rich with a positive local wisdom and in accordance with the values of Pancasila, need to be raised and developed so as not to be deprived of the spirit as a communal society. Therefore, some of the values contained in Hindu law, even in accordance with the values contained in Pancasila, need to be nurtured and formulated into positive laws. To achieve these objectives, it is necessary to work hard to strengthen by taking compilation and codification of norms of Hindu law from all components of society, ie academics, public figures, local and central government and legislative bodies, so as to create a set of Hindu law as positive law that can be applied in solving concrete legal problems, including the impacts of the effects of globalization.

Keywords: globalization, Hindu law, local wisdom, and reflection.

1. Introduction

In addition, it is inevitable that the flow of globalization has affected the State and the behavior of the nation. The world without borders, the flow of technology, capital, goods and services has moved so freely. Starting from 2015, the nations in ASEAN already face the ASEAN Economic Community agreement. In such contexts, the existence of law within the State is no longer exclusive and discriminatory, but otherwise capable of providing a sense of security, comfort and justice for every person who exists and strives in this State.

One important concept that can be used to increase resilience in all aspects of life in the face of this era of globalization is by strengthening local wisdom that is imbued by the religious law of every community in the nation community. Indonesia is one country in Southeast Asia that has local wisdom. Regarding this, Azyumardi said:

Pluralism and diversity are striking reality in Southeast Asia. As Hefner argues, few areas of the non-Western world illustrate the legacy and challenge of cultural pluralism in a manner more striking than in Southeast Asian countries of Malaysia, Singapore, and Indonesia. J.S. Fumivall, a British administrator and political writer before World War II, in fact introduced the concept of plural societies, and identified the countries known today as Indonesia, Malaysia and Singapore as its most striking examples (Azyumardi, 2004: 46).

Pluralism and diversity in Indonesia can be seen from several kinds of religions embraced by the people of Indonesia. Pluralism and diversity are based on Pancasila (the five basic Indonesian states). In the first principle Pancasila is mentioned about "Belief in the one and only God". The precepts serve as the basis that states that Indonesia recognizes and protects the religious community. In Indonesia, there are 6 religions, namely Islam, Christian, Catholic, Buddhist, Hindu and Kong Fu Chu. Hinduism is the oldest religion. In the history of Indonesia, several major Hindu kingdoms, among others Majapahit, Kutai, and Mataram Hindu Kingdom. In Hinduism, there are sections that contain rules of conduct. This section is called Hindu law.

Indonesia is a country based on law. In a state of law, any form of human activity or action, society or state shall be based on law. In more concrete conditions it is often said that all component activities within the state must be based on constitution or the basic law. On the basis of it is intended that all activities that occur within the state is not arbitrary inter and inter human, society and country. Hindu law can be a source in the drafting of national law, and is used to regulate human behavior in society.

Hindu law refers to the system of personal laws (marriage, adoption, inheritance, etc.), traditionally derived from Hindu texts and traditions, that shaped the social practice of Hindu communities. In Vedic times, Hindu law was the legal system described and imagined in *Dharmasastra* texts. The genesis of Hindu law has gone through many periods of growth beginning in early India (ancient Hindu law) through the *Dharmasastra*, to colonial appropriations (Anglo-Hindu law) to the establishment of the modern personal law system (modern Hindu law) (New World Encyclopedia).

The strengthening of the existence of Hindu law becomes an important instrument in protecting and fortifying society's behavior in accordance with norm, cultural value of Indonesian nation, on the contrary not to be eroded into free behavior without any direction even contrary to the values of Pancasila as the nation's life view. Based on the concept of thought, the exposition in this paper will further describe the analysis of "The Strengthening of Hindu Law Reflection in Globalization Era."

2. Discussion

2.1 Legal Provisions Applicable in the State

Within the framework of the establishment of a state of law, the enactment of a rule, the norm into the laws of the law including how the law is enforced in a concrete event requires the existence of a legal politics. The legal politics of a democratic country will seek to give the public the opportunity to participate in determining the style and content of the law. The Indonesian state based on Pancasila with the principle of kinship will have its own legal policy in accordance with the legal aspect (*rechtsidee*), contained in Pancasila and the 1945 Constitution. There are 3 (three) levels of political policy legislation contained within the framework of the *rechtsidee* paradigm, namely

1. In the political order, the objective of Indonesian law is the establishment of a democratic constitutional state.
2. In the social and economic order, legal politic aims at realizing social justice for all Indonesian people.
3. In the normative order, legal politic aims at upholding justice and truth in every aspect of public life. These three objectives are in a national legal order that is sourced and based on Pancasila and the 1945 Constitution.

The main purpose of law is to give justice, certainty and benefit to society, but in reality, the facts speak differently. In plain view, various cases disturb the sense of justice with discriminatory law enforcement. On the other hand, Indonesian legal politics does not intend to establish a state of power (*machtsstaat*) with the type of government or power that is oligarchy, absolute monarchy, authoritarian or totalitarian.

The product of legal provisions produced by formal legal sources, as a whole is a system. The system is a regular arrangement of elements that make up a unity. In connection with the law, these elements are a set of legal provisions which are the legal products of formal legal sources that apply in a society's life. The position of a legal provision in the life of a society depends on the position of the law in the legal system prevailing in the life of the people concerned (Abdul Latif and Hasbi Ali, 2010: 42).

The position of a legal provision is determined by 2 (two) terms, namely: first, the nature of the legal provisions that can be divided into principles of law and the provisions of ordinary law; second, the country's regulatory system. Furthermore, when viewed from the content of the principle of law has a higher position when compared with ordinary law, because the contents of ordinary law is a detailed description of the principle of law, more ready to apply, moreover the ordinary law has been established in the source of formal law. However, ordinary legal provisions shall be subject to the content of the principle of law.

Historically, the legal provisions that once regulated the position and the regulation of the legislation in Indonesia such as Provisional People's Consultative Assembly Decree No. XX / MPRS / 1966 replaced by People's Consultative Assembly Decree no. III / MPR / 2000, (Abdul Latif and Hasbi Ali, 2010: 43). Then in the reform era, regulated by Act no. 10 of 2004 which has been replaced by Act No. 12 of 2011 on the Establishment of Legislation. The provisions of article 2 of this Act regulate Pancasila as the source of all sources of state law. Article 7 provides that the type and hierarchy of the Laws and Regulations consist of:

- a. Of the 1945 Constitution of the State of the Republic of Indonesia;
- b. Decision of the People's Consultative Assembly;
- c. Act / Government Regulations in Lieu of Act;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regulations; and
- g. District/ City Regulations

From the perspective of the hierarchy of laws and regulations, it is clear that the Hindu Law and *Adat* Law which until now is a religious norm can not be regarded as a legal principle based on the application of lower legal provisions, or as a rule of ordinary law, formal law which is included in one of the hierarchy of the above legislation. The existing Hindu law has not been properly compiled and codified in a coherent, systematic, detailed and applicative, positive and formal set of rules. This causes the Hindu Law not to be applied directly and has a legal effect, meaning that it has rights and obligations for those affected by the law.

From another perspective, it seems that Hindu law is still a collection of rules, religious norms and for those who are in violation of moral sanctions or social sanctions. Therefore, to become a set of core (non-complementary) laws in the national legal system requires a long struggle through intense scrutiny through scientific research, further inventorying Hindu law in accordance with the development of society, from

academics, Hindu scholars, Hindu organizations, Local Government (Bali), Regional Representatives Council and House of Representatives.

2.2 Various Norms in Society

Norm is a measure that must be obeyed by a person in relation to his neighbor or his social environment. The term norm is derived from the Latin, or Arabic rule which is often interpreted with guidelines, standards or rules. In Bali and Lombok known term *drsta* which means peg, evolved into a guideline, rule or *sepat siku-siku*. So in its development, the norm is defined as a measure or benchmark for a person in acting or behaving in society. Thus, the core of a norm is all rules that must be obeyed (Maria Farida Indrati Soeprapto, 1998: 6).

In the life of society, there are always various norms that directly or indirectly affect the way people behave or act. In the State of Indonesia, the norms that are still highly perceived are the norms of custom, religious norms, moral norms and legal norms of the state. Because in Indonesia consists of various islands and tribes, and there is freedom of every citizen to embrace his religion and worship according to their respective religions, then the norms of moral, customary norms, existing religious norms and also apply differently from one another. So that the moral norms, customs norms and religious norms that apply only to certain communities only. However, the enactment of a norm of state law is absolute, in the sense that every legal norm of the state applies to all people residing in the State of Indonesia, so it is said that the norms of morals, customs and norms of religion have differences with state law norms (Maria Farida Indrati Soeprapto, 1998: 7).

2.3 Conception of Indonesia as a State of Law

Conceptually the principles of the State of Law can be put forward by a number of leading scholars in the field of law, such as:

1. F.J. Stahl (in Mahfud MD, 2001), formulates that the modern legal state must meet at least 4 (four) terms:
 - a. States should protect human rights;
 - b. There must be separation of power and sharing of power;
 - c. Governance must be based on law; and
 - d. There should be an administrative court.
2. Paul Scholten (in Azhary, M.T., 1992), mentions three main elements of a state of law, namely:
 - a. The recognition of human rights;
 - b. There is a separation of powers;
 - c. The existence of a government based on the law.
3. Sheltema, expressed the element of the rule of law by emphasizing the element of legal certainty, equality, democracy, and government serving the public interest. While Zippelius, giving emphasis to the rule of law, the guarantee of human rights, the distribution of power and judicial guarantees against the government (Attamimi, 1990).

In Anglo Saxon countries, generally the understanding of the rule of law follows the Rule of Law concept of A.V. Dicey by emphasizing the main elements of supremacy of law, equality before the law, and the constitution based on individual rights (Schmid 1959). In principle, between the concepts of Rule of Law and *Rechtsstaat*, have in common in the philosophy-based basis of liberalistic-individual, limitation of *wetmatig*-based state power, and the absolute separation of state and religion.

The difference between *Rechtstaat* and Rule of Law concept only concerns the existence of state administrative courts. In the concept of *Rechtstaat*, state administrative justice becomes one of the main elements that stand independently of the general judiciary, while the concept of rule of law, the existence of such a judgment is considered unnecessary. This is related to the principle of equality before the law in the concept of rule of law, where officials and ordinary citizens are equal before the law, therefore equally subject to the general judiciary.

In addition, the constitutional system, which is one of the normative ideas of the rule of law, has consequences that must follow the four imperative principles of constitutionalism, namely: (1) All political power must be subject to the law. (2) The existence of guarantee and protection of human rights. (3) A free and independent judiciary. (4) Public accountability, as the main point of popular sovereignty.

The rule of law is a normative idea to prevent or avoid the arbitrariness and assurance of equality before the law. Moreover, the idea of the state is based on the law, giving rise to imperative imperatives that all political power must be subject to the law. Protection of human rights is a normative idea to guarantee the rights of the people as the governed. Checks and balances, as well as normative ideas to avoid absolutism in the exercise of state power, and to ensure the passage of democracy. While *rechterlijke controle* is a normative idea to avoid the occurrence of coercion of the will by a strong party against the weak, including between the ruled and the governed.

Indonesia as one of the ranks of the modern state, especially today after the reform of 1998, the concept of the rule of law has been stated explicitly in Article 1 paragraph (3) of the 1945 Constitution, which states the

State of Indonesia is a state of law. The unequivocal statement of the concept of a state of law governed in the body of the 1945 Constitution carries the consequence of no interpretation that the state of Indonesia is not a state of law. Unlike the case with the enactment of the 1945 Constitution prior to the 1998 reform, the concept of legal state in Indonesia is set in the Elucidation of the 1945 Constitution, which generates many interpretations that the explanation section does not have a fundamental legal power when compared with the concept of the rule of law is regulated in the body of the Constitution 1945. We still remember in the study of constitutional history, there is an interpretation that the Elucidation of the 1945 Constitution is said to be a personal explanation of Mr. Soepomo. That is why in the 1945 Constitution (amendment) does not contain any explanation. Only then shall the articles of the 1945 Constitution be deregulated back into the lower legislation of its position.

In addition, by looking at the provisions on the structure of the above legislation, it appears to have conformed to the theory of the legal norm level Hans Kelsen (*Stufentheorie*). The theory suggests that a legal norm is always based on and derived from the above norms, but under the rule of law it also becomes the source and the basis for the lower norms. Hans Nawiasky subsequently grouped the legal norms within a country into four major groups consisting of:

1. *Staatsfundamentalnorm* (State Fundamental Norms)
2. *Staatsgrundgesetz* (Basic Rules/ Principles of State)
3. *Formell Gesetz* (Formal Act)
4. *Verordnung dan Autonome Satzung* (Implementing rules and autonomous rules), (Maria Farida Indrati Soeprapto, 1998:26-27).

In addition to formal law, Indonesia also has Adat law. Adat law is a kind of “Indonesian customary law.” However, the matter is not as clear and distinct as that. Adat in Indonesian context always comes with an attribution; it can be adat Sunda, adat Jawa, adat Aceh, adat Minangkabau, adat Sulawesi, etc. There is no such thing called ‘adat Indonesia.’ The reason is because not only was adat as a legal discipline established by Dutch scholars long before Indonesia was created as a nation state, but also because these adats essentially always take part in and integrate with diverse ethnicities and ‘nationalities’ in the archipelago (Zezen Zaenal Mutaqin, 2011: 352).

2.4 Indonesian Political Legislation

Political legislation is one of the legal sub-systems. Politics concerning the forming procedures associated with the legal system and legal instruments used in the formulation of legislation. Political application of law relating to the functions of governance in the field of law. Politics of law enforcement relating to the joints of the state system such as the state based on the law.

Internally, there are 2 (two) main spheres of legal politic: (1) Political formation of law both on the procedure and the contents of legislation is policy related to the creation, renewal and development of law covering (i) legislation, (ii) jurisprudential law formation policy, and policy on unwritten rules; (2) The policy of law enforcement and implementation is related to: (i) judicial policy (litigation) and non-litigation (non-litigation) legal settlement, (ii) legal service policy (Abdul Latif and Hasbi Ali, 2010: 164-165).

The exposure to the political sphere of the law above is, in fact, indistinguishable but inseparable, since:

- a. The success of a legislation depends on its application;
- b. Decisions in the context of law enforcement are the instruments of control for the accuracy or lack of a legislation. The verdict constitutes an input for legal reform or refinement of statutory legislation;
- c. Law enforcement is the dynamics of legislation.

Political formation and good law enforcement must be accompanied also by the politics of human resources development, work procedures and organizing and facilities and infrastructure. This tends to contribute to the success of political establishment and law enforcement. Furthermore, according to Abdul Latif and Hasbi Ali (2010: 165-166), the pattern and content of political laws and legislation may be different due to several factors:

1. Political style of legislation, legislation will basically reflect the most influential political thoughts and policies, for example, the doctrine of socialism will be different from economic capitalism or life view based on Pancasila as in Indonesia.
2. Level of community development, such as strata in the field of socio-economic education and the level of homogeneity of individuals in society.
3. Global influences, such as copyright, brand, patent, human rights, workers' welfare and so on.
4. Foreign intervention, related to terrorist, environment (climate change), world trade organization (world trade organization), gender equality etc.

The face of Indonesian law in reform era has not been able to position itself as a commander in creating legal certainty or in realizing community justice. This can be proved by the many feuds between state officials, even though they are leaders of state institutions in the Republic, even those who are expected to be able to build, maintain, implement and enforce the law well for the creation of justice and the welfare of the people.

It has not been lost in our minds that in the political stages of the State, in recent decades, such hostilities

have occurred among members of the People's Procurement Council even to the beating, as well as among law enforcement officers, the Corruption Eradication Commission and the Police, inter-agency criminalization, the politicization of the People's Consultative Assembly questionnaire to the Corruption Eradication Commission, including the controversy of judges' conduct in law enforcement in the courts. It's like an Indonesian law like a spider's web, only capable of being an instrument to capture a helpless little creature, or like a sharp knife down, but blunt upward.

In view of these conditions, the idea of reform in the field of law should be guarded by all the organizers of the State and society, in order to create a State capable of protecting its people in the framework of realizing a prosperous, just and prosperous society based on Pancasila and the 1945 Constitution. Efforts to establish the existence of law and an independent judiciary, is a necessity in the State of Indonesia, because, in the absence of law and independent judiciary could lead to the abuse of political power and economic power oligarchy. Thus the realization of justice in a democratic country, demands commitment from law enforcers, the availability of community facilitators for access to justice and the legal paradigm that has a popular spirit.

2.5 Configuring Hindu Law in Balinese and Lombok Adat Law

Hinduism and law have often been understood as Hindu law: A body of fixed positive law and legal hermeneutics that can be used to govern the lives of Hindus (Deepa Das Acevedo, 2013: 252). Hindu law is defined as the rules or legal norms governing its people in all spheres of life, whether those concerning ethics, social, political, philosophy, culture, law and so on (Surpha, 2005:15). Another opinion states that Hindu Law is a law that regulates the interests of human law (Hindus) in accordance with religion or dharma which is believed to be eternal truth because it is sourced to the Rta. In comparison with Hindu law in India, Prof. Werner Menski, commented that Hindu law in India has always been a people's law. Hence, something as complex as Hindu personal law could not be reformed and abolished by a statute, nor could its influence as a legal normative order, that permeates the entire Indian socio-legal field, be legislated into oblivion (Flavia Agnes, 2016: 616).

According to Pudja (1977: 11), the laws of the Vedic is Rta and Dharma. Both Rta and Dharma mean law in Hindu law. Rta is the eternal law of nature whereas Dharma is the law of the world, whether applied or not. Other terms of law in Hindu law are *Widhi*, *Drsta*, *Acara*, *Agama*, *Wyawahara*, *Nitiswara*, *Rajaniti*, *Arthasastra*, etc. Regarding the source of Hindu law is set in the *Manawa Dharmasastra* scriptures II: 6, in the form of: 1) *Sruti*, 2) *Smrti*, 3) *Sila*, 4) *Acara*, dan 5) *Atmanastuti*.

Donald R. Davis says, "if we view the *Dharmasastra* texts not as codes of black-letter law to be applied by judges, but as textbooks of materials, hypotheticals, and systematizations pertaining to a legal system, we can utilize these texts for insight into both the theory and the practice of law." (Donald R. Davis, 2006: 290). The entire Vedic literature is the first source of dharma, *Smrti* is a provision, a guideline of practice and doctrine based on *Sruti*, *Sila* is the doctrine of the behavior of civilized people, *Acara* is customs that live in society and *Atmanastuti* is the satisfaction of each person accordingly with the value of Hinduism.

Hindu law is not applied directly in Indonesia, but Hindu law is perceived into *Adat Law*. The definition of Balinese *Adat Law* in Balinese and Lomboknese is a complex of norms, written or unwritten, containing orders, permissibility and prohibitions that govern relationships among human beings, human relationships with their natural environment and human relationships with God (Windia and Sudantra, 2006: 6). Based on the above conception of understanding, it seems that between Hindu Law and Balinese Adat Law, there is no difference of principle concerning the substance and the scope of the regulated behavior, because in reality the behavior of Balinese people is influenced by the teachings of Hinduism.

The Balinese lifestyle (Balinese community) is very religious, with a very strong Hindu influence. The strong belief in religious values in Balinese life makes it difficult to identify which aspects of Balinese life are derived from indigenous Balinese culture, traditions or customs and which aspects of life are influenced or sourced from religion. It also happens in the life of the Balinese law. Without research and in-depth study, it is very difficult to distinguish between customary rules (traditions, community habits) and the rules that come from the teachings of Hinduism. As it is known that the purpose of law and the concept of Balinese life is to realize balance and harmony in relationships among human beings, the environment and God called *tri hita karana* (Windia and Sudantra, 2006: 10-11).

On the other hand the concept of balance and harmony is recognized as the universal life principle adopted in Indonesian society, as can be seen in the literature of adat law. Soepomo, an Indonesian adat law expert, stated that the Indonesian mind is cosmic, meaning always seeking balance with nature. The existence of the cosmos is always distinguished into the real world and the unreal (the supernatural). These two realms can not be separated but are a totality. Likewise Ter Haar, declared the Indonesian people are always thinking magically, that is starting from the possibility of directing the magical power derived from nature to be used as a magical provision in all human actions (B. Ter Haar, 1973).

The views as described above are then concretized in Adat law norms. In the living order of Balinese society, *Adat* law norms can be found in customary rules made by various customary institutions in Bali such as

pakraman village (adat), banjar, subak, etc. This rule is commonly referred to as awig-awig, which is essentially a set of legal rules that grow and develop in Balinese society, so it can be said as living law. Some important aspects formulated therein are required, permissible or prohibited actions such as the necessity of every *krama desa* (member of *pakraman* village) to carry out the *ayah* (obligation to the village), the exception for the *krama* does not perform the *ayah* (obligation) for certain reasons (*mapuankid*, *ngampel*, *luput ayah*, etc.), prohibition for people being *cuntaka* (dirty) entering the sacred area, cutting trees in the forest, herding four-legged pet on sanctuary, and others. In the formulation, there are provisions of adat law that directly mention the sanctions and some are not, then discussed and decided through *sangkepan* (meeting) for the next set as a *perarem*.

With the illustration as above, many people believe that the Adat law in Bali and Lombok is Hindu law. To ensure the correctness of the view is still very much needed further study, with in-depth research, whether the living and prevailing customary law for the Balinese today is synonymous with Hindu law. The academics need to be skeptical, to doubt whether the formulation of the provisions found in Hindu literature can be called Hindu law, given the basic concept of a legal norm containing elements of command, permissibility, prohibition and the legal consequence of raising a right and a duty. From this skepticism will be able to give birth to a sense of curiosity (human inquiry) on the existence of Hindu law.

In the framework of understanding the concept, it seems that academics need to recall the theoretical debates about customary law relations with religious law. First, the theory of *receptio in complexu* from CF. Winter and Salomon followed by LWC Van den Berg, which explains that the customary law prevailing in a society is a religious law adopted by that society, because with the entry of a person into a particular religion he fully accepts and is subject to the relevant religious law. Second, the *receptie* theory of Snouck Hurgonje and Van Vollenhoven, which essentially states that the living law for the people of Indonesia, customary law regardless of its religion, religious law perceives inwardly and applies as long as it is desired by customary law. In understanding this theory, customary law does not all perceive the value of religion held by the community, but in customary law only contains elements of religion.

To believe which theory applies in the relationship between Balinese *Adat* law and Hindu law, the important and strategic step that must be done first is to conduct an examination of the religious literature books that are considered to regulate or contain Hindu law. It is necessary to take steps to identify and inventory the values, principles and norms of Hindu law in it, and then see the linkage with Balinese *Adat* law in force now (Windia and Sudantra, 2006: 16).

In practice in the society, indeed it appears that a number of legal provisions derived from Hindu literature books that have been perceived into Adat law, or Adat law linked with Hindu law such as the *Adigama*, Religion, *Kutara Manawa*, *Purwagama*, *Manawa Swarga* and *Manawa Dharmasastra* scriptures. However, the reception into the Adat law is not fully done, because not all the material in Hindu law is in accordance with the situation, the condition and the needs of society (Widnya, 1988: 37).

Similar information can also be found in research conducted by the research team of Udayana University Faculty of Law, Bali, Indonesia, in research on the influence of Hinduism against Customary Criminal Law in Bali. The results of this study indicate the influence of Hindu law on the types of criminal acts of decency: *Lokika Sanggraha*, *Amandel Sanggama*, *Gamia Gamana*, *Salah Krama*, *Drati Krama* and *Wakparusia*. Other practices in the field of Adat civil law, especially in the context of family law are derived from the Manawa Dharmasastra Scriptures, such as a) provisions on patrilineal kinship (*kapurusa*), b) sentana provisions, c) marriage terms, d) provision of inheritance system, e) provisions on stridhana (*jiwadhana*) f) provisions on *gamia gamana*. In the Adigama scripture which has been perceived so far into *adat* law is in the form of criminal provisions (offenses) *Lokika Sanggaraha* customs in accordance with Article 359 Adigama scripture which enforcement through Emergency Act of Republic of Indonesia No.1 of 1951, as a consequence of no longer execution of *Raad Kerta* Court and abolished government of *Swapraja* in Bali.

2.6 Conception of Hindu Law in Legal System

In the perspective of legal theory, Lawrence M. Friedman explains that the legal system contains the legal structure, legal substance and legal culture. First, the legal structure is a pattern that shows how the law is run according to its formal provisions. This structure shows how courts, lawmakers and other bodies, the legal process is running and implemented. Secondly, the substance of the law is the legislation used by the law enforcement while performing the act and the legal relationship. Third, the legal culture is related to the culture of community law within the framework of law enforcement in the empirical level, (Friedman, 1975: 6-9). In a legal system, laws that are made to be effective, should meet several requirements:

1. The law made must be fixed, not temporary;
2. The law must be known by the community because the public has an interest to be regulated;
3. Laws (legislation) should not be in conflict with one another;
4. Not retroactive;

5. The law made must contain a philosophical, juridical and soisological basis;
6. Avoid changes too often;
7. The application of law should pay attention to legal culture;
8. The law should be made in writing by the authorized institution, (Abdul Manan, 2005:4).

Taking into account the concept of effectiveness of legal enforcement as described above, the following illustrates the configuration of the legal system tradition in the world, illustrating that the legal system in the world today is dominated by two popular legal traditions: the civil law system and the common law system. But if examined more deeply, the legal tradition is also familiar with the family of western legal tradition, eastern law family consisting of customary law system and islamic law system and socialist law system. (Wisnubroto, 2010:8-16).

a. The Civil Law System

The Civil Law System is known as a system with the Continental European Law tradition, with such characteristics:

1. Legal development is mostly done by scientists.
2. Law is more embodiment of the policy of the holder of power in disciplining the community. In this case, the law is more a social engineering, so in the implementation of formal justice should be prioritized to enforce legal certainty.
3. Implementation of the law lies in the concept of abstract formulated rules (only contains the principle) as a guide in solving concrete cases. The concept of the rule of law developed systematically doctrinal and based on legislation made by the legislature.
4. Legal discovery is defined as legal retrieval in legislation and law enforcement through interpretation method. If there is a case that requires a settlement, then the step is whether there is a law or is there a rule, then applied to concrete cases in accordance with the facts that exist.
5. A system directed to the cultivation of justice. Justice is perceived by the concept contained in the legislation. If the application of the law has been in accordance with the concept, then automatically has fulfilled justice.
6. Power of judgment is entirely in the hands of the Judiciary (judge).
7. To recognize the concept of distinction between public law and private law, as well as the distinction between civil law and commercial law in principle.

b. The Common Law System

The Common Law System is often called the Anglo Saxon legal tradition, with some of the following characteristics:

1. The law is developed by the practitioners (case law) and proceduralist through the settlement of cases in court. Despite this tradition, in recent times also developed a tradition of developing law through scientific studies at Anglo Saxon State universities.
2. Judge made law is the main legal source based on the doctrine of precedent, to be followed by other judges in deciding the same case (though recent developments in Anglo-Saxon countries have also developed laws that come from the act made by parliament.
3. Law is to accommodate the sense of community justice so that in the implementation of substantial justice takes precedence over the formal justice.
4. Rules are concrete and have led to the settlement of a particular case. The concept of rules is connected with the judge's decision and formulated in concrete content. Legislation is not absolute (not the primary source of law).
5. The discovery of the law by a judge can be interpreted as the formation and creation of law (not just the search and application of law). So in the application, the legal facts are first sought and then the provisions of the law.
6. Law is more a set of procedures designed to achieve a case resolution (justice is perceived as a demand of the parties or the demands of society). Justice is seen to have been achieved, if the application of law in accordance with the demands of all parties or the community.
7. Not recognizing the distinction of public law with private law, as well as in the settlement of cases between individuals in society and officials resolved in the same court.

c. Customary Law System and Religion Law (Islamic Law System).

Developing countries still adhere to traditional values (customary order) and religious law. However, since such countries as Indonesia were once colonized by the Europeans, the traditional legal tradition is not pure anymore, many of which are secular countries dominated by western law.

Traditional law tradition places the *adat* law order which is dominated by custom law or unwritten law as its legal source. While the tradition of religious law refers to the source of the most important law of the Holy Scriptures with the method of interpretation. The settlement of a case is committed by indigenous peoples through *adat* leaders and is based on laws that apply to local communities from generation to

generation, such as the density of *Qadi* to Islam, and *Raad Van Kerta* led by the Priest (*Pedanda*) to Hindus in Bali and Lombok in Dutch colonization.

Justice in customary law lies in the concept of balance in a broad sense, including microcosm and macrocosm, outer and inward), so it is relative. Sanctions are not a punishment, but rather as a means or condition to restore the balance. The requirement to restore the balance is determined by indigenous peoples. This is in line with the characteristics of Balinese indigenous peoples, where between *adat* law and religious law (Hindu) seem united, that custom is imbued with Hindu values. While justice in Islamic law is somewhat different that is absolute because it has been regulated in detail in the Holy Scripture (Qur'an) which is the Revelation of Allah. This tradition is corroborated by Van Den Berg's findings with *Receptie Complexu's* theory that customary law can be applied when it has adapted to religious law.

d. Socialist Law System

Historically, this legal system developed from the principles of Marxism and Leninism (in Eastern European countries), so that law is seen as an absolute tool for building socialism and as a tool to protect the power of the power class, which is in this case held by the Communist Party . As a consequence, the characteristics of socialist law are based on communist ideology, among others:

1. The principle of collectivism is applied absolutely, thereby greatly limiting individual relationships.
2. All publicly oriented, including its law to prioritize public and state interests, consequently there is no private law within the socialist state.
3. The law is conceptualized as a means of suppressing the oppressed class.
4. Law is a tool of policy for the authorities so that jurists and judges must interpret legislative texts in accordance with the instructions of the authorities.

In the present era of socialist law in communist countries seems dimmed with the rapid influence of globalization based on liberal forces and capitalism.

e. Customary Law in the Indonesian Law System

The direction of the legal policy as set out in Chapter IV letter A point 2 of the 1999 State Policy Guidelines states that "Arranging a comprehensive and integrated national legal system by recognizing and respecting *adat* law and religion law and renewing discriminatory legislation of colonial and legal heritage, including gender inequality and its inconsistency with demands for reform through the legislation program". Furthermore, in Act of Republic of Indonesia No. 25 of 2000 on the National Development states that so far, law enforcement supremacy is degraded. These conditions, among others, caused by the many laws and regulations made by the past government does not reflect the aspirations of the community and the needs of development which are based on religious law and customary law.

From the two provisions of the above legislation, it appears that *adat* law and religion law are positioned as the basis for the future development of Indonesian law. This means that in the context of establishing Hindu law and customary law will be of great importance in the development of national law. Moreover State Policy Guidelines mandate emphasizes the development of national law is intended to uphold justice, truth and order within the Indonesian legal state based on Pancasila and the 1945 Constitution. The development of national law directed to increase legal awareness, ensuring enforcement, service and legal certainty and realize the national legal order that serve on the national interest.

Hindu law is believed by its adherents to contain eternal truth (*sanatana dharma*), therefore the existence of Hindu law in the national legal system is a necessity. In the teachings of Hinduism there is a conception that mandates everyone's obligation to his country with the concept of State obligations and obligations of a person carrying out his religious teachings with the concept of Religion. The real concept teaches loyalty and obedience, obedience and respect for all state rules and religious teachings. All of that is directed to the attainment of a life of peace and justice in the birth and the inner.

Thus the contribution of Hindu law and *adat* law in the development of national law will be able to strengthen the mandate of the State Policy Guidelines, namely to uphold justice, truth and order in the Indonesian legal state based on Pancasila and the 1945 Constitution, thus creating legal awareness, ensuring law enforcement, service and certainty and realizing the national law that serves the national interest. Until now, the existence of Hindu law, which is largely visible in the form of religious norms, in the reality of Balinese life has positively influenced the level of obedience both to customary law and to the laws and regulations of the state. Although since 1951 the customary court (*Raad Kerta*) has been abolished, it does not mean that Hindu law just disappears. The values, rules, norms of Hindu law derived from Hindu literature, some have been reconciled into Balinese *adat* law as a legal norm alive in the life of Balinese society. The regulated provisions are of course as a provision in accordance with the sense of community justice and the development of Balinese society today.

When viewed from the perspective of the theory of legal norms, Hindu law norms can not be categorized as ordinary law, let alone as extra ordinary law, because until now, Hindu law has not been compiled into positive law (*ius constitutum*) and not yet included in the level of hierarchy of law in Indonesia according to the Act of Republic of Indonesia No. 12 of 2011. Hindu law is still categorized as *ius constituendum* (future law) which

then requires the establishment of the legislative body as a law, which derives from the norm of religion as a norm that is still alive and accepted by society. At least, in the implementation of law enforcement system in Indonesia, Hindu law norms that have been reconciled into Balinese and Lombok *adat* law still can be applied in accordance with article I of Transitional Rules of the 1945 Constitution (amendment).

As an indicator can be seen from the provision of Hindu law that has been derivated into customary law, indigenous criminal acts, namely *Lokika Sanggraha*, *Wakparusia*, *Gamia gamana* has been adopted into the draft of Indonesian Criminal Code to be established as a positive criminal law of the State of Indonesia. In addition, in order to anticipate the legal vacuum, the Article 27 paragraph (1) Act of Republic of Indonesia no. 48 of 2009 on Judicial Power regulates that "Judge as law and justice enforcer, shall search, follow and understand the living law". Thus there is an obligation for judges to explore, follow and understand the values of the living law in society in the framework of giving substantive justice.

2.7 Increasing the Existence of Hindu Law in the Global Era

With the advent of information and communication technology instruments today's, the world is getting smaller, the distance is getting shorter and all information is acceptable to anyone without censorship. In the reality of global life, we are deeply affected by both negative and positive impacts. This is an undisputed law of nature (*Rta*) and in the teachings of Hindu law, the people of Bali and Lombok are familiar with the concept of duality, namely *rwa bhineda: sekala-niskala, sakral-profan, luan-teben, bhuana agung-bhuana alit, suci-leteh, kiwa-tengen*, etc., where the concept is an inseparable unity.

Many positive impacts can be seen from the progress of globalization such as commitment, loyalty, quality, discipline, time value, creative, innovative, positive thinking, cooperation (solidity), effective-efficient, legal certainty, while the negative impact of freedom of access to global information is the decline of behavior, moral ethics and morals of the nation. Based on the consequences of global influence as mentioned above, the relevance of Hindu law in the framework of fortifying the Hindu community to win the competition of life and moral degradation needs to be revitalized and reflected in a national positive law as well as in social institutions, customary law. Therefore, a deep assessment of the values of Hinduism including Hindu law, which is still relevant and irrelevant to the development of the present age.

Hindu law as part of the value of the teachings of Hinduism, contains the universal value of the doctrine of truth (*dharma*), the essence of life, balance, and togetherness into a peaceful and harmonious order of life, which is often called the concept of *satyam, ciwam, sundaram*. Some Hindu laws derived from the books of religious law, such as *Manawadharmasastra (Manu Dharmasastra)*, Books on the four religious Laws: book of religion law, book of *Adi Agama*, law of *Purwa Agama* and law of *Kutara Agama*, have been reflected into Balinese *adat* law such as *lokika sanggraha, drati krama, gamia gamana, mamitra ngalang*, one of *krama, wakparusya*. Types of sanctions in Balinese *adat* law: *lokika sanggraha, drati krama, gamia gamana, mamitra ngalang, salah krama, wakparusya*.. In addition, custom offenses such as *lokika sanggraha, wakparusya, kumpul kebo dan gamia-gamana* have been reflected in the draft of Indonesian criminal law.

In addition, some customary criminal acts in the field of morality in the community Sasak, Lombok (Widnyana, 2013: 130-135), there are several such types:

1. *Muger*; indecent acts committed by an adult male against an adult girl / girl by embracing, holding so that the woman or her family is humiliated.
2. *Bekekaruh*; an act of intercourse committed by a man with a woman / girl outside of a legal marriage.
3. *Bero*; marriages committed in families who are still in close blood relation and between the couple there is a ban for marriage.
4. *Ngeregah*; the act of a person or several persons entering another's possession illegally or by unlawful means in order to gain profit.
5. *Salaq tingkah*; the act of embracing a girl who is done with likes, but done in public.
6. *Ngambis*; customary criminal act that is lighter than *Muger*.

Some of the dynamics of Hindu life in a global era that must be improved include: the principle of hard work (*Bhagavadgita*), the principle of respect for initiative and creativity (*Sarasamuscaya* (82) and *Manawa Dharmasastra* (XI: I, 4), the principle of respect for time (*Sarasamuscaya*) principles of cooperation (*Yajur Weda* and *Reg Weda*), etc. (Ardana, 2007: 67).

3. Summary

3.1 Conclusion

Based on the exposure and analysis as illustrated in advance, it can be drawn some conclusions as follows:

- a. Hindu law norms originating from Hindu scriptures and literature have been partially perceived in Balinese and Lomboknese *adat* law, which is used as a legal instrument to regulate the life of Balinese (tribal) people in the context of *Tri Hita Karana* in order to realize a peaceful and prosperous society.
- b. The existence of Hindu law, which is largely visible in the form of religious norms, has had a positive

- effect on the level of public adherence, both to *adat* law and to state legislation.
- c. Hindu law and Adat Law in the national legal system, are not currently compiled into the positive law (*ius constitutum*), because they have not been established as formal laws and regulations in accordance with the Act of Republic of Indonesia No. 12 of 2011 on the establishment of legislation.
 - d. Hindu law norms are perceived as religious norms that are still alive and acknowledged by the community so as to anticipate the role of judge as the inventor of the law in judging a case, especially in Bali and Lombok (vide Article 27 paragraph (1) of the Act of Republic of Indonesia 48 of 2009 on Judicial Power)
 - e. In anticipation of the enormity of global influence, the values of Hindu religious teachings and Hindu law need to be reflected into the customary, *awig-awig* (Balinese customary law), customs of indigenous people of Bali and Lombok with good and consistent and enforcement of customary sanctions in accordance with human rights.

3.2 Recommendation

It is urgent and important to have cooperation between Parisadha Hindu Dharma Indonesia (Hindu Organization) and the University to form a research team and compile Hindu law that is still in accordance with the needs and development of society. Fighting the presence of *Ad Hoc* (incidental) Judges in the General Courts system related to the occurrence of custom and religious cases in Bali and Lombok.

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